IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO.496 OF 2002

(By Accused against conviction)

Someshwar Siddappa Wali alias Birajdar .. Appellant

vs.

The State of Maharashtra .. Respondent

Mr.R.V.More with Mr. Umesh Mankapure and Mr. Shantaram, Dheple for Appellant
Mr.D.P.Adsule, A.P.P. for State.

CORAM : V.M.KANADE, J

DATE : 28TH OCTOBER, 2004

P.C.

1. The appellant is challenging the Judgment and order passed by the IInd Ad-hoc Additional Sessions Judge, Sangli in Sessions Case No.87 of 2001. By the said judgment and order, the appellant-accused was convicted under section 376 IPC and was sentenced to suffer R.I for 10 years and to pay fine of Rs.100/- in default to suffer S.I. for 7 days.

2. The prosecution case is that the complainant

Renuka was residing at Lingayat galli, Kupwad in alongwith her husband, two sons and daughter Kirti. The accused was a hawker who used to sell bakery products from door to door. The accused used to visit one Gangappa Sutar who was staying in the neighbourhood. On 7th February, 2001 at about 3 p.m. the accused met the complainant and asked her about the whereabouts of the said Gangappa Sutar. and also asked for a glass of water. The complainant accordingly, gave a glass of water to the accused. Thereafter, he was playing with her daughter Kirti. At 3.15 p.m. the complainant left the house to look after the foodgrains which she had kept on the platform for drying and at that time as he heard the noice of Kirti who was crying in a high voice and she came back where she saw that the accused was lying on her daughter Kirti and when he saw the complainant, he put on his pant and ran away. The complainant noticed that there was bleeding from the vagina of her daughter. A complaint was lodged. Her daughter was taken to Civil Hospital. The accused was arrested. Charge sheet was filed against the accused. The trial Court convicted the accused. The appellant has preferred this appeal against the said judgment and order.

3. Learned counsel appearing on behalf of the appellant has submitted that the medical evidence

which was adduced by the prosecution did not support the prosecution case of rape on the minor girl who was 2 1/2 years old. He submitted that there were no injuries on her private parts and there were neither any external injuries or internal injuries found on her person. He submitted that if force had been applied on the child, there would have been greater damage to the internal organs of the child. He relied on the opinion given by various medical experts in support of his submissions. He submitted that though it was difficult to disbelieve presence of the accused at the scene of offence, it was not possible to accept the prosecution case of rape on the child as it was not supported by medical evidence. He submitted that therefore the accused was entitled to be acquitted of the charge under section 376 IPC.

4. Learned counsel appearing on behalf of the State vehemently opposed the submissions made by learned counsel appearing on behalf of the accused. He submitted that the complainant had stated in her evidence that she had seen the accused lying on the child and after she had entered the house, he put on his pant and ran away. It was submitted that the complainant had seen that there was bleeding from the private parts of the prosecutrix. He submitted that the accused was caught red handed and even slight penetration was sufficient to constitute rape

under section 376 IPC.

5. The prosecution examined Dr. Sanjay Bhave PW 6 who is the doctor who immediately examined. PW 6 examined the prosecutrix at 4.30 a.m. and noticed that the victim had vaginal bleedings. On examination, he found that after external examination he admitted her in the gynaecological ward for internal examination. In external examination conducted by this witness he has stated that there was abrasion over her right knees. PW 7 is Dr. Abhinandan Gujar who was working in the Gynacological Department and he examined the prosecutrix. He noticed that the external genetalia was normal. There was no evidence of external injury. There was a small tear of 0.5 x 0.2 x 0.1 cm at posterior vaginal wall and tear was at 6 O'clock position. The posterior fouchette was normal. There were no bleeding from the tear. He has admitted in his cross-examination that there were no bruises, swelling or laceration on external genitals and he agreed with the proposition in Modi's Medical Jurisprudence wherein it has been observed that if suitable violence is used, there is often laceration of fourcette and perinaeum. He has also admitted that there were no sperms found on the child. He has admitted in cross-examination that there were no injury to labia majora and in cases of rape, in case of forcible penetration, labia majora gets blunt on account of forceful blow. He has

further admitted that he has not stated in his report as to how injury admeasuring 5 x 0.2 x 0.1 cm is caused.

6. From the evidence of these witnesses, who were examined by the prosecution, it can be seen that there were no injuries on the private parts of the prosecutrix. From a perusal of the Modi's medical Jurisprudence, it can be seen that it is stated that in cases where there is rape on an infant girl below the age of 10 years in case force is used, there are always chance of forchette and perineaum being damaged. Similarly, injuries are found on the vulva i.e. inner lining of the vagina. In the present case, no such injuries are found on the child. Thus, in my opinion, medical evidence does not support the prosecution case of rape. There is no doubt true about small tear of hymen. However, the doctor has not given any opinion as to whether the said tear would be caused as a result of penetration of penis. In cases of small girls, hymen is quite inside the vagina and therefore there is a tear in hymen, external private parts also are damaged. In this case, there are no external injuries on other private parts. It is possible that hymen get torn on insertion of a finger or any other blunt object. The incident in question was not witnessed by any person. The complainant states that she had seen the accused lying on the child. That after the

accused had left, she had seen bleeding from the vagina. The medical evidence does not suggest that there was penetration of penis. PW 6 had examined the accused and he did not find any injuries on the penis. He also noticed that there was absence of spegma. However, in the cross-examination he has admitted that smegma can be absent if penis is carefully washed. In view of this evidence, I am of the view that the prosecution has not proved beyond reasonable doubt that the accused had committed rape on the child.

7. However, presence of accused is proved from the evidence of the complainant Renuka Bagewadi who was examined by the prosecution. The accused was also immediately arrested from the nearby vicinity. The complainant has also stated that the accused was playing with the child when she had gone to attend to her work of drying foodgrains in the neighbourhood. The accused in my view has therefore, molested the child by fondling her private parts either with a finger or with some other object. Conviction therefore will have to be converted from that under section 376 IPC to that under section 354 IPC. The accused therefore is acquitted under section 376 IPC. However, he is convicted under section 354 IPC and is sentenced to undergo R.I. for two years. The appellant is in jail since 7th February, 2001. He has therefore already undergone sentence. The appellant therefore

will have to be discharged forthwith unless he is required in some other case.

8. Appeal is partly allowed in above terms.

V.M.KANADE, J

HIGH COURT

A.S.

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Mr.R.V.More with Mr. Umesh Mankapure and Mr. Shantaram Dheple for Appellant

Mr.D.P.Adsule APP for State.

CORAM : V.M.KANADE, J

DATE: 28/10/2004

For the reasons recorded separately in the accompanying judgment, the court converts the conviction of the appellant from that under section 376IPC to that under section 354 IPC and he is sentenced to undergo R.I. for two years and he is acquitted under section 376 IPC.

The appellant is in jail since 7/2/2001. He has therefore undergone sentence. The appellant will have to be discharged forthwith.

Appeal partly allowed. Order accordingly.

Dt. 2.11.04 **for Addl.Registrar J)**

(R.N.Ghanate)